No. 89-1201

In The

Supreme Court of the United States

October Term, 1989

LESTER C. TOLLEFSON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether this Court has certiorari jurisdiction to review an interlocutory order of the Montana Supreme Court reversing a pretrial decision of a court of limited jurisdiction which found Mont. Code Ann. § 61-8-401(4)(c) (1989) unconstitutional.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

Bateman v. Arizona, 429 U.S. 1302 (1976) 6

Berman v. United States, 302 U.S. 211 (1937) 6

Parr v. United States, 351 U.S. 513 (1956) 6

STATUTES:

Montana Code Annotated

§ 3-1-101 (1989) 2

§ 3-1-102 (1989) 2

§ 3-10-303 (1989) 2

§ 45-2-101 (1989) 3

§ 46-17-203 (1989) 7

§ 46-17-311 (1989) 7

§ 61-8-401 (1989) 1

§ 61-8-401(1)(a) (1989) 1

§ 61-8-401(4)(c) (1989) 4, 5

§ 61-8-714 (1989) 3

United States Code

28 U.S.C.S. § 1257 ..... 5, 6

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

On March 26, 1989, the petitioner, Lester C. Tollefson, was charged in the Justices' Court for Missoula County, Montana, with driving under the influence of alcohol, a violation of Mont. Code Ann. § 61-8-401 (1989).[1] In

[1] That statute provides in relevant part:

(1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:

(a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public[.]

Montana, justices' courts are courts of limited jurisdiction[2] and are not courts of record.[3] Driving under the

---

[2] Mont. Code Ann. § 3-10-303 (1989) sets out the limited criminal jurisdiction of justices' courts and provides in relevant part:

> The justices' courts have jurisdiction of public offenses committed within the respective counties in which such courts are established as follows:
>
> (1) jurisdiction of all misdemeanors punishable by a fine not exceeding $500 or imprisonment not exceeding 6 months or both such fine and imprisonment;
>
> . . . .
>
> (3) concurrent jurisdiction with district courts of all misdemeanors punishable by a fine exceeding $500 or imprisonment exceeding 6 months or both such fine and imprisonment[.]

[3] Mont. Code Ann. § 3-1-101 (1989) provides:

> The following are courts of justice of this state:
>
> (1) the court of impeachment, which is the senate;
>
> (2) the supreme court;
>
> (3) the district courts;
>
> (4) the municipal courts;
>
> (5) the justices' courts;
>
> (6) the city courts and such other courts of limited jurisdiction as the legislature may establish in any incorporated city or town.

Mont. Code Ann. § 3-1-102 (1989) provides:

> The court of impeachment, the supreme court, the district courts, and the municipal courts are courts of record.

influence of alcohol is classified as a misdemeanor offense,[4] which is within the limited criminal jurisdiction of Montana's justices' courts.

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[4] Mont. Code Ann. § 61-8-714 (1989) provides in relevant part:

(1) A person convicted of a violation of 61-8-401 shall be punished by imprisonment in the county jail for not less than 24 consecutive hours or more than 60 days and shall be punished by a fine or not less than $100 or more than $500. The jail sentence may not be suspended unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being.

(2) On a second conviction, he shall be punished by a fine of not less than $300 or more than $500 and by imprisonment for not less than 7 days, at least 48 hours of which must be served consecutively, or more than 6 months. Three days of the jail sentence may not be suspended unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being.

(3) On the third or subsequent conviction, he shall be punished by imprisonment for a term of not less than 30 days, at least 48 hours of which must be served consecutively, or more than 1 year, and by a fine of not less than $500 or more than $1,000. Notwithstanding any provision to the contrary providing for suspension of execution of a sentence imposed under subsection, the imposition or execution of the first 10 days of the jail sentence imposed for a third or subsequent offense that occurred within 5 years of the first offense may not be deferred or suspended.

A misdemeanor offense is defined by Mont. Code Ann. § 45-2-101 (1989), which provides in relevant part:

(36) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term or a fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

Prior to trial of this charge in the Justices' Court for Missoula County, petitioner filed a motion in limine seeking to have the court declare Mont. Code Ann. § 61-8-401(4)(c) (1989)[5] unconstitutional and to suppress the results of a blood alcohol concentration breath test administered to petitioner shortly after his March 26, 1989, arrest for the offense at issue here. (Resp. App. 1 and 2.)

The Justices' Court for Missoula County found the challenged section of Montana Law unconstitutional but denied petitioner's motion to suppress the results of the breath test. (Pet. App. 3.) Thereafter, the State filed a motion to reconsider with the Justices' Court, arguing that because the statutory provision at issue involved an element of the underlying criminal offense about which the jury would ordinarily be instructed, any alleged constitutional infirmity in the challenged statute could best be corrected by instructing the jury in language which would not conflict with existing constitutional precedent. (Resp. App. 3.) The Justices' Court denied the State's motion to reconsider, specifically holding that the State

---

[5] That statute provides in relevant part:

> Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:
>
> . . . .
>
> If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

would be precluded from offering a curative instruction. (Pet. App. 4.)

The State then sought a writ of supervisory control from the Montana Supreme Court, arguing that the Montana statute at issue could be construed and applied in a constitutionally valid manner and that the State should be allowed to so instruct at the time of trial. (Resp. App. 4 and 5.) By order dated September 21, 1989, the Montana Supreme Court took supervisory control of the matter and reversed the order of the Justices' Court which found Mont. Code Ann. § 61-8-401(4)(c) 1989 unconstitutional. (Pet. App. 1.) Thereafter, petitioner filed this action seeking a writ of certiorari. Petitioner has not, to date, been tried, convicted, or sentenced in the Justices' Court for Missoula County on the misdemeanor charge at issue.

SUMMARY OF ARGUMENT

This Court should deny the petition for writ of certiorari because the decision of the Montana Supreme Court at issue is not a final decision within the meaning of 28 U.S.C.S. § 1257.

ARGUMENT

Petitioner attempts to invoke this Court's certiorari jurisdiction to review an interlocutory order of the Montana Supreme Court directed to a court of limited jurisdiction in a case in which petitioner has not been tried, convicted, or sentenced. Although the court of limited

jurisdiction involved is not a court of record, the current status of the case is evident from the order at issue. (Pet. App. 1 at 5.)

28 U.S.C.S. § 1257 provides in relevant part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Respondent would not deny that the order at issue here is from the highest court of our state or that it involves a state statute which is alleged to be repugnant to the Constitution of the United States. The order, however, is not a final judgment within the meaning of 28 U.S.C.S. § 1257.

This Court has long held that, in a criminal case, the final judgment for certiorari purposes is the sentence rendered following a conviction. *Bateman v. Arizona*, 429 U.S. 1302, 1306 (1976); *Parr v. United States*, 351 U.S. 513, 518 (1956); *Berman v. United States*, 302 U.S. 211, 212 (1937). Here, there has been no conviction or sentence. In addition, individuals convicted in a Montana justices' court have an absolute right to an appeal in our district

courts and such an appeal is a trial de novo.[6] If respondent were to be convicted in district court, he would then have an avenue of appeal to the Montana Supreme Court, our highest court.

In the present case, there is no "final judgment" for this Court to review. Petitioner has not been convicted or sentenced at even the initial trial court level. As the Montana Supreme Court pointed out in the order for which review is sought, "Because our ruling is for purposes of this case only, this issue may be raised in the event defendant is convicted and obtains a trial de novo in district court." (Pet. App. 1 at 5.)

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[6] The right to a new trial in district court following a justices' court conviction is secured by Mont. Code Ann. § 46-17-311 (1989) which provides in relevant part:

> (1) Except as provided in 46-17-203, all cases on appeal from justices' or city courts must be tried anew in the district court and may be tried before a jury of six selected in the same manner as a trial jury in a civil action, except that the total number of jurors drawn shall be at least six plus the total number of peremptory challenges.
>
> (2) A party may appeal to the district court by giving written notice of his intention to appeal within 10 days after judgment, except that the state may only appeal in the cases provided for in 46-20-103.

Mont. Code Ann. § 46-17-203 (1989) refers to the entry of a guilty plea in a justices' court and forecloses the opportunity for an appeal of a conviction based upon such a plea.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX INDEX

Item		Page
1.	Motion in Limine	App. 1
2.	Defendant's Brief in Support of Motion in Limine	App. 3
3.	Motion for Reconsideration	App. 14
4.	Application for Writ of Supervisory Control (Without Accompanying Exhibits)	App. 20
5.	Memorandum in Support of Application for Writ of Supervisory Control	App. 23

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IN THE JUSTICE COURT OF MISSOULA COUNTY, STATE OF MONTANA

BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA, Plaintiff, -vs- LESTER TOLLEFSON, Defendant.	)	Cause No. 57585 MOTION IN LIMINE

COMES NOW the Defendant, Lester Tollefson, by and through his attorney, Noel K. Larrivee, and hereby moves this court to declare M.C.A. Section 61-8-401(4)(c) unconstitutional. M.C.A. Section 61-8-401(4)(c) unconstitutionally (1) violates the defendant's presumption of innocence, and (2) creates a mandatory rebuttable presumption. This motion is based upon *Rolle v. State of Florida*, 13 F.L.W. 1030, May 6, 1988, and other authorities cited in the brief filed contemporaneously herewith.

DATED this 18th day of April, 1989.

LARRIVEE LAW OFFICES

/s/ Noel K. Larrivee
Noel K. Larrivee

Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of April, 1989, a true and correct copy of the foregoing Motion in Limine was mailed, postage prepaid to the Plaintiff's counsel at the following address:

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IN THE JUSTICE COURT OF MISSOULA COUNTY, STATE OF MONTANA

BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA, Plaintiff, -vs- LESTER TOLLEFSON, Defendant.	)	Cause No. 57585 DEFENDANT'S BRIEF IN SUPPORT OF MOTION IN LIMINE

FACTUAL SUMMARY

On March 26, 1989, Les Tollefson, the Defendant, was arrested and charged with driving under the influence of alcohol in violation of M.C.A. Section 61-8-401. The pertinent parts of this statute provide:

> 61-8-401. **Persons under the influence of alcohol or drugs.** (1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:
>
> (a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
>
> . . .

(3) "Under the influence" means that as a result of taking into the body alcohol . . . a person's ability to safely operate a motor vehicle has been diminished.

(4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, *shall give rise to the following presumptions*:

. . .

(c) *If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.*

Jury trial has been set in this matter for May 1, 1989.

ISSUE

The issue presented for review is whether M.C.A. Section 61-8-401(4)(c) is unconstitutional on the grounds that it conflicts with the Defendant's presumption of innocence and is violative of the defendant's due process rights.

This matter is brought before the Court by way of a Motion *in limine*. Its purpose, in general, is the exclusion of prejudicial matter in advance of its mention in court by means of a judicial determination as to its admissibility.

Black's Law Dictionary defines *in limine* as follows: "On or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary Revised, 896 (4th ed. 1968). The motion *in limine* is perhaps best defined in the cases; it is a practical, commonsense innovation and is appropriately a part of the working law. For example, the court in *Bituminous Casualty Corporation v. Martin* said, "The only purpose of the motion [*in limine*] and order was to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury." *Bituminous Casualty Corporation v. Martin*, 78 S.W.2d 206, 208 (Tex. 1972). Thus, this motion has as its object the exclusion of material which, by its mere mention, result in prejudice on the part of the jury. In this case, the State intends on introducing evidence of the Defendant's blood alcohol level (in excess of 0.10). Such evidence is irrelevant when the presumption is declared unconstitutional. The effect of the motion would be to limit *any* evidence pertaining to the blood alcohol level of the Defendant. For these reasons, the most appropriate method to decide such issue is a motion in limine. As most attorneys recognize, curative instructions and sustained objections to improper questions often merely call more attention to the offending evidence, thus emphasizing its prejudicial effect. *See* Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 754. The use of a motion to exclude any mention of such matters allows the trial to proceed with less chance of error.

In January, 1974, a Montana Supreme Court decision recognized and upheld the use of a motion *in limine*. *Kipp v. Wong*, which originated in Yellowstone County, was a negligence action against a tavern owner by a patron who

was injured when an unruly person also present in the tavern shot him, along with two others. *Kipp v. Wong*, ___ Mont. ___, 517 P.2d 897 (1974). The court granted a motion *in limine* excluding testimony of one witness, Smith, who had seen the assailant, Gardiner, in the alley near the bar earlier in the evening during a fight. The excluded testimony related to Smith hearing a shot in the alley after his return to the bar. The court, per Mr. Justice Daly, held:

> "We concur with the trial court's view that plaintiff failed to demonstrate the probative value or relevance of this offered evidence. We find that trial court acted reasonably and within its sound discretion in granting the pretrial motion to exclude, in examining witness Smith outside the presence of the jury, and in excluding portions of Smith's testimony relating to gunshot sounds." *Id.* at 901.

In March, 1974, the Montana supreme court again upheld the granting of a motion *in limine* in Wallin v. Kinyon Estate, in which a will was admitted to probate over the contention that the drawer of the will was practicing law without a license and had unduly influenced the testator. *Wallin v. Kinyon Estate*, ___ Mont ___, 519 P.2d, 31 St.Rptr. 256 (1974). Since the will complied with all statutory requirements, the motion *in limine* was granted excluding any mention of the qualifications of the public administratrix who drew the will. The Supreme Court held that the district court had properly granted the motion and a directed verdict admitting the will to probate, and even went so far as to find that the court had properly denied a continuance on the basis of

surprise, the motion having been filed the day before trial.

In approving the granting of the motion *in limine* in *Wallin*, Mr. Justice Haswell wrote for the court as follows:

> "Authority for the granting of a motion in limine rests in the inherant [sic] power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties. *People v. Jackson*, 95 Cal. Rptr. 919, 18 Cal. App. 3d 504. Rule 16(6), M.R.Civ. P., permits the court in its discretion to consider " . . . matters as may aid in the disposition of the action." . . .
>
> The decision of the district court in excluding questions at trial of the proponent's alleged practice of law was conducive to the prevention of irrelevant, immaterial and prejudicial evidence being heard by the jury." *Id.* at St.Rptr. 259-60.

It is anticipated that the State will not dispute the Defendant's right to make a motion *in limine*. The purpose of motions *in limine* are to prevent situations where the prejudice to the Defendant cannot be cured retroactively. As the Court well knows, trying to "undo" or cure the damage often only serves to highlight the damage done.

The goal of both the State and the Defendant is a fair trial. The relief sought, an Order in limine directing that M.C.A. Section 61-8-401(4)(c) is unconstitutional, is the only mechanism to protect the Defendant's rights and insure a fair trial. The alternative is to begin the trial, have the State offer evidence of the Defendant's blood alcohol level, and then be confronted with the issue of

admissibility of such evidence. This motion is brought to avoid the necessity of a mid-trial continuance or motion for mistrial.

ARGUMENT

I. SECTION 61-8-401(4)(c) IS UNCONSTITUTIONAL.

To sustain the charge of driving under the influence of alcohol, the State must prove that the Defendant:

1. was driving a motor vehicle
2. upon the ways of this state open to the public
3. within Missoula County
4. while under the influence of alcohol

"Under the influence" means that as a result of alcohol a person's ability to safely operate a motor vehicle has been diminished.

See M.C.A. Section 61-8-401.

Since the first three elements of this crime are easily proven, and generally undisputable, the fourth element "while under the influence of alcohol" is the linchpin of the State's case. Proving "under the influence" requires proof that a person's ability to safely operate a motor vehicle has been diminished. But, Section 61-8-401(4)(c) resolves that issue for the State as well.

M.C.A. Section 61-8-401(4)(c) provides that if the accused's blood alcohol concentration is 0.10 or more, "it shall be presumed that the person was under the influence of alcohol. Such a presumption is rebuttable."

M.C.A. Section 61-8-401(4)(c) is unconstitutional for several reasons.

A. SECTION 61-8-401(4)(c) VIOLATES THE DEFENDANT'S PRESUMPTION OF INNOCENCE.

Essentially, once it has been established that the Defendant's blood alcohol concentration is 0.10 or more, Section 61-8-401(4)(c) permits the jury to *assume* that the Defendant was under the influence of alcohol *without any further evidence.* This permits the trier of fact to prejudge a conclusion which the jury should reach of its own volition.

> "A presumption which would permit the Court to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, *this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."* (Emphasis in original) *Sandstrom v. State of Montana,* 442 U.S. 510, 522, 99 S.Ct. 2450, 2458, (1979).

Section 61-8-401(4)(c) is thus unconstitutional because it violates the Defendant's presumption of innocence.

Similarly, this same issue was addressed in *City of Missoula v. Shea,* 202 Mont. 286, 661 P.2d 410 (1983). In *Shea,* supra, our State Supreme Court stated:

> "Rule 301(b)(2), Mont.R.Evid., states that a disputable presumption 'may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in

> accordance with the presumption.' Thus, the trier of fact is not free to accept or reject the presumption. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. We therefore come to the conclusion that the prima facie presumption is unconstitutional and invalid."

Id. at 414.

B. SECTION 61-8-401 (4)(c) CREATES AN UNCONSTITUTIONAL MANDATORY REBUTTABLE PRESUMPTION.

The State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the Defendant. *Sandstrom*, 442 U.S. at 524, 99 S.Ct. at 2459. But, Section 61-8-401(4)(c) provides that is [sic] *shall be presumed* that the person was under the influence of alcohol if the BAC was 0.10 or more. Thus Section 61-8-401(4)(c) is an unconstitutional mandatory rebuttable presumption because it relieves "the state of its burden of proof of the essential element of impairment by instructing the Court not that it has a choice to determine whether the Defendant was impaired based upon the results of a mechanical test, but that it must accept as proven the essential fact of impairment if the test result shows a blood alcohol reading of 0.10% or more." *Role v. State of Florida*, 13 F.L.W. 1030, 1031 (4th Dist. Florida, April 27, 1988) (Case No. 87-2089). [Attached]

As the U.S. Supreme Court noted in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, (1985), "A mandatory rebuttable presumption does not remove the presumed

element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the Court that it must find the presumed element unless the Defendant persuades the court not to make such a finding . . . such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." 471 U.S. at 317, 105 S.Ct. 1972-73. *See also, Sandstrom v. State of Montana,* 442 U.S. 510, 523-524, 99 S.Ct. 2450, 2459 (1979); *County Court of Ulster County v. Allen,* 442 U.S. 140, 157, 99 S.Ct. 2213, 2225 (1979).

Thus M.C.A. Section 61-8-401(4)(c) creates an unconstitutional mandatory rebuttable presumption.

C. "THE PRESUMPTION IS REBUTTABLE" IS MISLEADING.

The State will certainly argue that Section 61-8-401(4)(c) provides that "Such presumption is rebuttable." However, "The very statement that the presumption 'may be rebutted' could have indicated to a reasonable juror that the Defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the [presumption]." *Francis v. Franklin,* 471 U.S. 318, 105 S.Ct. 1973.

Further, Montana rule of Evidence 301(b)(2) provides that a presumption "may be overcome by a preponderance of evidence contrary to the presumption." Such a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of driving under the influence. *See also Sandstrom v. State of Montana,* 442 U.S. at 518, 99 S.Ct. at 2456.

Clearly, the language "the presumption may be rebutted" does not remedy the constitutional defect in M.C.A. Section 61-8-401(4)(c).

CONCLUSIONS

M.C.A. Sections 61-8-401(4)(c), (1) violates the Defendant's presumption of innocence, and (2) creates an impermissible mandatory rebuttable presumption, and thus should be declared unconstitutional by this court.

For the foregoing reasons, it is respectfully requested that the Court issue an Order in limine finding M.C.A. Section 61-8-401(4)(c) unconstitutional and prohibiting the introduction of any evidence of the Defendant's blood alcohol level or argument by counsel regarding the same.

DATED this 18th day of April, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of April, 1989, a true and correct copy of the foregoing Defendant's Brief in Support of Motion in Limine was mailed, postage prepaid to the Plaintiff's counsel at the following address:

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IN THE JUSTICE COURT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF MISSOULA
BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA, Plaintiff, -vs- LESTER C. TOLLEFSON, Defendant.	Cause No. 57585 MOTION FOR RECONSIDERATION

COMES NOW the State of Montana, Plaintiff in the above-entitled case, and moves this Court for reconsideration of its order dated May 22, 1989.

On May 22, 1989, this Court held the presumption in Section 61-8-401(4)(c), MCA, unconstitutional. During the briefing and oral argument of the issues raised in the Defendant's motion in limine, alternative jury instructions were discussed generally. The State now requests that this Court reconsider its decision in light of the specific jury instruction now offered by the State.

All legislative acts are presumed constitutional. When interpretations of a statute may vary, a constitutional interpretation is favored over one that is not. *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d

948 (1985); *T & W Chevrolet v. Darvial*, 196 Mont. 287, 641 P.2d 1368 (1982).

In deciding whether the presumption in Section 61-8-401, MCA, is constitutional, this Court limited its consideration to Montana statutory law and case law from the United States and Montana Supreme Courts. It refused to allow any alternative jury instruction regarding the presumption, stating that there is no support for an alternative instruction. The support for allowing proper jury instructions comes from the rule of law that constitutionality is presumed and from the case law of various other jurisdictions faced with the issue at hand.

In *Barnes v. People*, 735 P.2d 869 (Colo. 1987), the Supreme Court of Colorado discussed at length a statutory presumption almost identical to Montana's. The court eventually held that the jury instructions given in the case were improper, but found that the statutory language created a permissive inference. The court's discussion included the following:

> In criminal cases, the use of presumptions raises serious concerns because these evidentiary devices potentially conflict with the basic principles that a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt.
>
> . . .
>
> As a result, to avoid implicating these constitutional limitations, presumptions in criminal cases are ordinarily construed to raise only permissive inferences. (Citations omitted) Indeed, even where statutory language appears to create a mandatory presumption in criminal cases,

courts commonly read the statute as creating only a permissive inference.

. . .

> In this view, courts in other states reviewing presumptions contained in DUI statutes substantially similar to Colorado's have concluded that the language "shall be presumed" or its equivalent creates only a permissive inference that a defendant was under the influence. *See, e.g. Commonwealth v. Moreira,* 385 Mass. 792, 434 N.E.2d 196 (1982) ("shall be a presumption"); *State v. Dacey,* 138 Vt. 491, 418 A.2d 856 (1980). *See also State v. Hanson,* 203 N.W.2d 216 (Iowa 1972) ("shall be admitted as presumptive evidence"); *State v. Bailey,* 184 Kan. 704, 339 P.2d 45 (1959); *State v. Cooke,* 270 N.C. 644, 155 S.E.2d 165 (1967); *Commonwealth v. Ditrancesco,* 458 P.2d 188, 329 A.2d 204 (1974). In light of this background, we believe that Section 42-4-1202 is properly construed to authorize only a permissive inference that a defendant was under the influence of alcohol. (Footnotes omitted.)

735 P.2d at 872-73. The court then reviewed the jury instructions that had been given. The case was remanded because the jury instructions conflicted, but the decision left no doubt that the jury could have been instructed regarding the presumption.

The result was the same in *State v. Dacey,* 418 A.2d 856 (Vt. 1980), where the Supreme Court of Vermont struck down misleading jury instructions, but upheld the statutory presumption:

> We therefore hold that § 1204(a)(3) creates a permissive inference, shift no burden to the defendant, and permits but does not compel a jury finding that defendant was under the influence of intoxicating liquor while operating a motor

> vehicle upon proof of .10% or more blood-alcohol content by weight at the time of operation. (Citations omitted.) (Emphasis in original.)

418 A.2d at 859. *See also, State v. Coates,* 563 P.2d 208 (Wash.App. 1977); *Commonwealth v. DiFrancesco,* 329 A.2d 204 (Pa. 1974).

The Supreme Court of Kansas considered the issue at hand in *State v. Price,* 664 P.2d 869, 872 (Kan. 1983). It stated: "The jury instructions will generally be controlling in deciding whether a presumption is conclusive or permissive in a case, although their interpretation may require recourse to the statute involved and cases decided under that statute." The court went on to rule that the jury instructions given, including one that used the words "you shall presume", were proper. 664 P.2d at 873.

The proper procedure in a case such as this is to allow the parties to offer jury instructions regarding the presumption and its application to the facts. As shown in cases discussed above, the *application* of the presumption is critical to any violation of a defendant's rights. The Montana Supreme Court has held that a defendant must show the invalidity of a presumption as it is applied to him or there is no prejudice. *Parker v. Crist,* ___ Mont. ___, 621 P.2d 484 (1980); *State v. Sunday,* 187 Mont. 292, 609 P.2d 1188 (1980). Even where a statute has been declared unconstitutional, the Montana Supreme Court has allowed substitution of proper jury instructions to protect a defendant's rights. *State v. Kramp,* 200 Mont. 383, 651 P.2d 614 (1982).

Based on the case law set out above, the State asserts that the following jury instruction should be allowed as a proper statement of law:

> You are instructed that if the defendant has an alcohol concentration in his blood, breath or urine of 0.10 or more, you are permitted, but not required to infer that he was under the influence of alcohol. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you. You must weigh the evidence presented and decide whether the State has proven beyond a reasonable doubt that the defendant was under the influence of alcohol.

This proposed instruction includes language similar to the presumption instruction approved by the Montana Supreme Court in the *Kramp* case. *Kramp*, 200 Mont. at 397, 651 P.2d at 621-22.

CONCLUSION

The State respectfully requests that this Court reconsider its decision and allow the proposed instruction.

DATED this 23rd day of June, 1989.

/s/ Barbara C. Harris
Barbara C. Harris
Deputy County Attorney

CERTIFICATE OF MAILING

I, Barbara C. Harris, do hereby certify that on the 23rd day of June, 1989, I mailed a true and correct copy of the foregoing Motion for Reconsideration, with postage prepaid and addressed to Noel Larrivee, 334 E. Broadway, Missoula, MT 59802.

DATED this 23rd day of June, 1989.

/s/ Barbara C. Harris

IN THE SUPREME COURT OF
THE STATE OF MONTANA

STATE OF MONTANA,

Plaintiff and Petitioner,

-vs-

LESTER C. TOLLEFSON,

Defendant and Respondent.

APPLICATION FOR WRIT OF SUPERVISORY CONTROL

COMES NOW the State of Montana and alleges as follows:

1. On March 26, 1989, the Defendant, Lester C. Tollefson, was charged with Driving Under the Influence of Alcohol, in violation of Section 61-8-401, MCA (Missoula County Ticket No. C04A057585). Following his arrest, Tollefson submitted to a blood alcohol test. Laboratory analysis of the blood showed a blood alcohol concentration of 0.18.

2. On April 18, 1989, the Defendant filed a pretrial motion in limine alleging that the presumption found in Section 61-8-401(4)(c), MCA, is unconstitutional. The Defendant further contended that evidence of his blood alcohol concentration should not be allowed at trial. (See Motion and Brief, attached hereto as Exhibit A.)

3. The issues raised in the Defendant's motion in limine were briefed by both parties (See State's Brief, attached hereto as Exhibit B) and oral argument was

heard by the Justice of the Peace on May 8, 1989. The issues include whether the presumption in Section 61-8-401(4)(c), MCA, is a mandatory or permission presumption and whether it violates a defendant's right to be presumed innocent. The procedural issue of whether the above issues should be decided prior to presentation of jury instructions was raised by the State.

4. On May 22, 1989, Missoula County Justice of the Peace David K. Clark ruled that the presumption regarding a blood alcohol concentration of 0.10 or greater is unconstitutional. Judge Clark further ruled that the State would be precluded from presenting any jury instructions referring to the presumption. (See Order dated 5-22-89, attached hereto as Exhibit C.)

5. On June 23, 1989, the State filed a Motion for Reconsideration, attached hereto as Exhibit D. The Motion included a proposed jury instruction regarding the evidence of blood alcohol concentration. The Motion was denied in an order dated July 13, 1989, and the Justice's Court again ruled that the presumption of Section 61-8-401(4)(c), MCA, is mandatory. (See Exhibit D, attached hereto.)

6. The requested writ is the State's only possible remedy. The Orders of the Justice of the Peace are not appealable pursuant to Section 46-20-103, MCA. If the State were required to wait until trial of this case, an acquittal would preclude further action by the State, as would a conviction. Therefore, the State of Montana has no remedy to obtain review of the orders other than a writ of supervisory control

7. Because the orders preclude the State from applying a statutory presumption in this case and others, and are otherwise not reviewable, this remedial writ is necessary to the administration of justice. Rule 17(a), Mont.R.App.Proc.

WHEREFORE, the Petitioner respectfully requests that this Court accept jurisdiction of this matter pursuant to Rule 17, Montana Rules of Appellate Procedure, stay the matter pending its determination, and issue a writ of supervisory control.

DATED this 7th day of August, 1989.

ROBERT L. DESCHAMPS III
Missoula County Attorney

/s/ Barbara C. Harris
Barbara C. Harris
Deputy County Attorney

CERTIFICATE OF MAILING

I, Barbara C. Harris, do hereby certify that on the 7th day of August, 1989, I mailed a true and correct copy of the foregoing Application for Writ of Supervisory Control, with postage prepaid and addressed to the following:

Noel Larrivee
334 E. Broadway
Missoula, MT 59802

Paul Johnson
Assistant Attorney General
3rd Floor, Justice Building
215 N. Sanders
Helena, MT 59620

DATED this 7th day of August, 1989.

/s/ Barbara Harris

IN THE SUPREME COURT OF
THE STATE OF MONTANA

STATE OF MONTANA,

Plaintiff and Petitioner,

-vs-

LESTER C. TOLLEFSON,

Defendant and Respondent.

MEMORANDUM IN SUPPORT OF APPLICATION FOR WRIT OF SUPERVISORY CONTROL

INTRODUCTION

Following his arrest for Driving Under the Influence of Alcohol (DUI), the Defendant, Lester Tollefson, submitted to a blood test that showed a blood alcohol concentration of 0.18. Prior to trial, he filed a motion and brief arguing that the statutory presumption applicable to his blood alcohol level is unconstitutional. The Justice's Court agreed with the Defendant and ruled that the presumption is unavailable to the State.

ARGUMENT

I. THE CIRCUMSTANCES OF THIS CASE REQUIRE THAT THIS COURT TAKE JURISDICTION.

The Justice's Court in this case has ruled that the presumption in Section 61-8-401(4)(c), MCA, is unconstitutional and that the State may not rely on it to prove

its case. The result of this ruling is not one listed in Section 46-20-103, MCA. Because the State may not appeal the ruling, it has no remedy other than an extraordinary writ from this Court. Such a writ is justified when there is no direct appeal or other remedial procedure available to provide relief and when extraordinary and compelling circumstances are present. Rule 17, Mont.R.App.C.Proc.; *State v. District Court*, 38 St.Rptr. 1204, 632 P.2d 318, 322 (1981). The extraordinary and compelling circumstance of this case is that the State is unable to otherwise obtain review of the justice's court decision that the statute is unconstitutional. Justice requires that this ruling, which results in the the [sic] loss of the use of the statutory presumption in this and numerous other cases, be reviewed.

II. THE PRESUMPTION IN SECTION 61-8-401(4)(C), MCA, IS CONSTITUTIONAL AND CAN BE CONSTITUTIONALLY APPLIED.

The presumption at issue here is set out in Section 61-8-401(4)(c), MCA, as follows:

> Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substances, shall give rise to the following presumptions:
>
> . . .

> (c) If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

All legislative acts are presumed constitutional. When interpretations of a statute may vary, a constitutional interpretation is favored over one that is not. *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985); *T & W Chevrolet v. Darvial*, 196 Mont. 287, 641 P.2d 1368 (1982). The Court of Appeals of Washington reviewed the same statutory presumption in *State v. Coates*, 563 P.2d 208 (Wash. App. 1977). In finding the presumption constitutional, the court stated:

> We conclude that the presumed fact of driving under the influence of intoxicating liquor follows beyond a reasonable doubt from the proven fact of a .10 percent blood-alcohol concentration, and R.C.W. 46.-61.506(2)(c) does not relieve the State of its burden of proof.

563 P.2d at 210.

In this case, the Justice's Court improperly chose an unconstitutional reading of the statute over a constitutional reading. In doing so, the court rejected the rulings of various other state courts.

In *Barnes v. People*, 735 P.2d 869 (Colo. 1987), the Supreme Court of Colorado discussed at length a statutory presumption almost identical to Montana's. The court eventually held that the jury instructions given in the case were improper, but found that the statutory language created a permissive inference. The court's discussion included the following:

In criminal cases, the use of presumptions raises serious concerns because these evidentiary devices potentially conflict with the basic principles that a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt.

. . .

As a result, to avoid implicating these constitutional limitations, presumptions in criminal cases are ordinarily construed to raise only permissive inferences. (Citations omitted) Indeed, even where statutory language appears to create a mandatory presumption in criminal cases, courts commonly read the statute as creating only a permissive inference.

. . .

In this view, courts in other states reviewing presumptions contained in DUI statutes substantially similar to Colorado's have concluded that the language "shall be presumed" or its equivalent creates only a permissive inference that a defendant was under the influence. *See, e.g. Commonwealth v. Moreira,* 385 Mass. 792, 434 N.E.2d 196 (1982) ("shall be a presumption"); *State v. Dacey,* 138 Vt. 491, 418 A.2d 856 (1980). *See also State v. Hanson,* 203 N.W.2d 216 (Iowa 1972) ("shall be admitted as presumptive evidence"); *State v. Bailey,* 184 Kan. 704, 339 P.2d 45 (1959); *State v. Cooke,* 270 N.C. 644, 155 S.E.2d 165 (1967); *Commonwealth v. Ditrancesco,* 458 P.2d 188, 329 A.2d 204 (1974). In light of this background, we believe that Section 42-4-1202 is properly construed to authorize only a permissive inference that a defendant was under the influence of alcohol. (Footnotes omitted.)

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The result was the same in *State v. Dacey*, 418 A.2d 856 (Vt. 1980), where the Supreme Court of Vermont struck down misleading jury instructions, but upheld the statutory presumption:

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The Court in this case disregarded the decisions in *Coates, Dacey, DiFrancesco*, and *Price*, and specifically disagreed with the decision in *Barnes*. Finding no ambiguity in the statutory language, the Court ruled that it is unconstitutional on its face. The Court's rulings preclude any instruction regarding the statutory presumption.

CONCLUSION

The Justice's Court in this case has ruled that Subsection 61-8-401(4)(c), MCA, is unconstitutional. For the proper administration of justice, this Court must take jurisdiction and review these otherwise unappealable orders. The Justice Court's ruling is contrary to case law from this State and others and must be reviewed.

DATED this 7th day of August, 1989.

ROBERT L. DESCHAMPS III
Missoula County Attorney

/s/ Barbara C. Harris
Barbara C. Harris
Deputy County Attorney

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